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88-406

Supreme Court, U.S.
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No. 88-___

In The

Supreme Court of the United States

October Term, 1988

MARION F. COLE, Personal Representative
of the Estate of
Deborah D. Eisenhut, Deceased,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the Court of Appeals erred in failing to apply the principles of the decision in *McMichael v. United States,* 751 F.2d 303 (8th Cir. 1985), and the decision of the United States Supreme Court in *Berkovitz v. United States,* U.S. Law Week (June 14, 1988, Page 4549).

2. Whether the Court of Appeals erred by affirming a summary final judgment of the trial court when there were disputed material facts and by further acting as a finder of fact resolving inferences from the facts in favor of the Appellee.

PARTIES

The parties to this proceeding are Marion F. Cole, Personal Representative of the Estate of Deborah D. Eisenhut, Deceased, and the United States of America.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Petitioner, Marion F. Cole, personal Representative of the Estate of Deborah D. Eisenhut, Deceased, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit, entered on June 10, 1988, rehearing denied August 4, 1988. The opinion of the Court of Appeals is set out in the separate Appendix at pages 15a to 25a. The denial of the Petition for Rehearing is set out in the separate Appendix at page 26a. The Order of the district court granting summary judgment, which was affirmed by the opinion of the Eleventh Circuit, is set out in the Appendix at pages 1a to 14a.

JURISDICTION

The opinion of the Court of Appeals was entered on June 10, 1988. A timely petition for rehearing was filed on June 28, 1988, and the order of the Court of Appeals denying the petition for rehearing was entered on August 4, 1988. Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISION INVOLVED

Federal Tort Claims Act

28 U.S.C. §2671, et seq.

STATEMENT OF THE CASE

This is an action brought by the Plaintiff, Marion F. Cole, as Personal Representative of the Estate of Deborah D. Eisenhut, Deceased, for wrongful death against the Defendant, United States of America, pursuant to the Federal Tort Claims Act arising under 28 U.S.C. §2671, et seq.

The parties engaged in discovery, and the Defendant subsequently filed a motion for summary judgment. On December 23, 1986, the district court granted the motion and entered judgment for the Defendant. (App. 1a). The Plaintiff filed a timely appeal and on June 10, 1988, the United States Court of Appeals, Eleventh Circuit, affirmed the trial court. (App. 15a). On August 4, 1988, the United States Court of Appeals, Eleventh Circuit,

denied the timely petition for rehearing filed by the Plaintiff. (App. 26a).

STATEMENT OF THE FACTS

On February 28, 1980, Deborah Eisenhut was killed while working on a contract between her employer, Ordnance Research, Inc. (ORI), and the U. S. Army Armament Research and Development Command ("ARRADCOM"). The contract was a purchase of smoke cartridges being developed and manufactured by ORI in conjunction with a research and development program by ARRADCOM.

At the time of her death, Ms. Eisenhut was loading the cartridges with a pyrotechnic composition known as "ORI Composition 119G". This highly dangerous and unstable powder exploded, instantly killing her.

Ms. Eisenhut's employer (ORI) was in the business of design, development, and manufacture of military ordnance for the U. S. government and had worked in this area for the government on previous contracts. ARRADCOM, which is the army's research and development arm, was interested in designing and developing an inexpensive, safe and reliable fuse for a 60 mm mortar which was also under development. This device would be a mortar practice round that upon impact, would make a noise, flash, and smoke. The smoke cartridge was to be located inside the mortar round, and to be used in military training. It was this smoke cartridge that ARRADCOM contracted with ORI to design and develop.

ORI filled a purchase order from ARRADCOM with a preliminary compound and sent it to ARRADCOM for testing. ARRADCOM requested certain revisions in the formula and ORI developed additional variations of it. In testing various compounds, ARRADCOM discovered that poisonous gasses were emitted and communicated this fact to ORI. As a result, ORI changed its formula developing a compound called "119G" and sent it to ARRADCOM. ARRADCOM tested 119G and found that the poison gas had been eliminated, but also discovered that the new compound was considerably more sensitive than the earlier compounds and presented substantial hazards in use and manufacture. The evidence by ARRADCOM personnel was that the new compound 119G was extraordinarily sensitive to friction or static electricity. These doubts were not communicated to ORI concerning the increased hazard of this formula.

The contract under which the deceased was working for ORI covered a purchase of ammunition, explosives, and related dangerous materials, as provided by the Department of Defense Contractor's Safety Manual for ammunition, explosives and related dangerous material ("DOD Safety Manual"). The manual, by its explicit terms mandated that it apply to such purchase contracts from private sources. Arms services procurement regulation (ASPR) 7-104.79, 1-323.1, and ARRADCOM purchase regulations provided for the application of the safety manual to all such contracts.

The DOD Safety Manual and the Arms Services procurement regulations provided for an extensive system of preaward safety surveys, post-award safety surveys, periodic safety surveys, and detailed enforcement of

strict safety standards to provide for safe keeping the contractors' personnel. The government's failure to include these mandatory safety regulations into the contract with ORI was a negligent failure to enforce mandatory safety regulations. As a result of the government's failure to enforce the mandatory safety regulations, proper safety inspections which ordinarily would have been conducted by government personnel were not carried out.

The Defendant did not include ASPR 7-104.79 in the contract as required, did not require adherence to the DOD Safety Manual as required, did not follow the safety rules of the ARRADCOM regulations as required and did not conduct safety inspections of ORI facilities as required. As a direct result of the Defendant's negligent failure to enforce its regulations, the ORI contract was carried out in unsafe conditions.

Government employees testified in discovery that the conditions at the ORI facility were extremely hazardous and that if ORI had been in compliance with the requirements of the above mentioned safety regulations, then the explosion killing Ms. Eisenhut most likely would not have occurred.

The evidence showed that even without the required safety clauses and safety enforcement, government employees were in fact in the ORI facility and witnessed, on several occasions, Ms. Eisenhut loading cartridges under hazardous conditions. The government failed to take any actions to correct this dangerous situation. Two days before the explosion, the government's safety inspector from munitions plants visited ORI. As a result

of the government's failure to enforce its mandatory safety regulations, Ms. Eisenhut worked under unsafe conditions resulting in the explosion which killed her.

REASONS FOR GRANTING THE WRIT

INTRODUCTION

The Court of Appeals' opinion missed the central issue decided by the district court and raised before the Court of Appeals. That is, whether the government's negligent failure to carry out the mandatory safety regulations was actionable under the Federal Tort Claims Act. The Court of Appeals mistakenly opined that the Plaintiff's contention was that the government should be vicariously liable, without fault, for the negligence of Ms. Eisenhut's employer. The negligence causing Ms. Eisenhut's death was the government's failure to carry out its own mandatory safety regulations. Thus, the liability to be imposed on the government was for its active negligence, and not of a vicarious nature.

I.

CERTIORARI SHOULD BE GRANTED BECAUSE THE COURT OF APPEALS' DECISION CONFLICTS WITH THE DECISION IN *BERKOVITZ V. UNITED STATES*, U.S. Law Week (June 14, 1988, page 4549), *McMICHAEL V. UNITED STATES*, 751 F.2d 303 (8th Cir. 1985); AND *GRIFFIN V. UNITED STATES*, 500 F.2d 1059 (3d Cir. 1974).

The central issue imposed in this case is whether the negligence of the government in failing to carry out and enforce mandatory safety regulations was protected by

the discretionary function defense of the Federal Tort Claims Act (FTCA). The appellate court dealt with this issue only in footnote 13 of its opinion. This was the focus of the trial court's opinion and the primary issue in contention before the trial court.

The evidence in this case showed that the government's failure to enforce binding safety regulations was actionable under the FTCA. The statement of the government's manager of specialized safety for the defense contract administration services region – Atlanta testified that if the government had required the deceased employer to operate in compliance with its mandatory regulations, then the explosion killing Deborah Eisenhut most likely would not have occurred. Contrary to the appellate court's statement that no cases were cited showing that the government had a duty to insert safety provisions into the purchase order, the Appellant did cite cases that the government's failure to comply with mandatory regulations constituted negligence. Those cases were *Griffin v. United States*, 500 F.2d 1059 (3d Cir. 1974); *Hatahley v. United States*, 76 S.Ct. 745 (1956); *Birmbaum v. United States*, 588 F.2d 319 (2d Cir. 1978); *Colorado Flying Academy, Inc. v. United States*, 689 F.2d 789 (8th Cir. 1982); *National Carriers, Inc. v. United States*, 755 F.2d 675 (8th Cir. 1985); and *McMichael v. United States*, 751 F.2d 303 (8th Cir. 1985).

The district court and the appellate court erred in finding the government's failure to enforce binding safety regulations to be a discretionary act, and thus making it immune from suit. The government's negligent act was not a discretionary policy decision, but was rather a failure to carry out mandatory safety regulations, and is

actionable under the Federal Tort Claims Act. These issues are supported by the decisions above stated and particularly by the decision of *McMichael v. United States, supra,* which dealt with facts substantially similar to the case at issue.

The position of the Petitioner was recently supported by the opinion of the United States Supreme Court in *Berkovitz v. United States,* U.S. Law Week (June 14, 1988 page 4549). This court noted that employees of regulatory agencies have no discretion to violate the command of federal statutes or regulations. Further, this Court found that the government, in failing to comply with mandatory and applicable safety standards, was negligent and responsible for the damage caused. The court specifically found that violation of mandatory safety regulations by government agencies is negligence and subjects the government to liability under the FTCA. The discretionary function defense does not apply under such circumstances. The Eleventh Circuit upon petition for rehearing had the opportunity to consider this Court's opinion in *Berkovitz,* apparently rejected its reasoning. Florida law is consistent with this Court's decision in *Berkovitz*. See, *Department of Health v. Yamuni,* 498 So.2d 441 (Fla. 3d DCA 1986), affirmed, 13 Fla. Law Week 354 (June 3, 1988) (state liable for breach of mandatory duties).

In summary, the government's negligent failure to implement mandatory safety regulations was operational and not discretionary. The government adopted regulations which required it to actively control and supervise the safety of the contractor's plant. The failure of the government to abide by its own regulations separates this case from those cited by the district court in its opinion.

Similar cases which are pertinent and support the position of the Plaintiff below are: *Neal v. Bergland*, 646 F.2d 1178 (6th Cir. 1981) (government may be liable for negligence in failing to require a subcontractor to comply with a contract safety requirement); *Barron v. United States*, 654 F.2d 644 (9th Cir. 1981) (government held liable for failure to take steps to eliminate contractor's disregard for major safety requirements); *Aretz v. United States*, 604 F.2d 417 (5th Cir. 1974) (government liable for negligent failure to communicate to independent contractor the government's change in classification of the dangers of materials); *Toole v. United States*, 588 F.2d 403 (3d Cir. 1978) (government liable where its employees knew that operation performed at independent contractor's plant was extraordinarily dangerous but neglected to warn the contractor of the dangers); *United States v. Babbs*, 483 F.2d 308 (9th Cir. 1973) (United States which employed independent contractor to manufacture combustible cartridge cases owed a duty to contractor's employees).

II.

WHETHER THE COURT OF APPEALS ERRED BY AFFIRMING A SUMMARY FINAL JUDGMENT OF THE TRIAL COURT WHEN THERE WERE DISPUTED MATERIAL FACTS, AND BY FURTHER ACTING AS A FINDER OF FACT RESOLVING INFERENCES FROM THE FACTS IN FAVOR OF THE APPELLEE.

The Eleventh Circuit incorrectly decided disputed issues of material fact. The bulk of the appellate court's opinion was devoted to giving a factual recitation which necessarily required a resolution of disputed facts. The district court also erred in doing this. If there are issues of

material disputed fact, the trial court should deny a motion for summary judgment. In determining whether there are such issues, the trial court should view the record in the light most favorable to the summary judgment opponent. *Mayo v. Ingle,* 733 F.2d 807 (11th Cir. 1984). Summary judgment should be entered only when the moving party has sustained its burden of showing the absence of a genuine issue as to any material fact when all evidence is viewed in the light most favorable to the non-moving party. *Morrison v. Washington County, Alabama,* 700 F.2d 678 (11th Cir. 1983). The district court and the appellate court incorrectly resolved numerous factual disputes in the record. The appellate court's resolution of disputed facts with respect to this and other issues on the appeal was incorrect and in violation of this court's opinions respecting the role of summary judgment in *Celotex v. Catrett,* 106 S.Ct. 1548 (1986); *Anderson v. Liberty Lobby, Inc.,* 106 S.Ct. 2505 (1986); and *Matsushita Electric Industrial Co. v. Zenith Radio Corp.,* 106 S.Ct. 1348 (1986).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted and the decision of the court below reversed.

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APPENDIX OF OPINIONS TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

MARION F. COLE, Personal Representative of the Estate of DEBORAH D. EISHENHUT, Deceased,
Plaintiff,

v.

UNITED STATES OF AMERICA,
Defendant.

PCA 83-4106-WS

ORDER

(Filed Dec 24, 1988)

This cause comes before the court on defendant's motion for summary judgment (document 71). Plaintiff has brought this suit under the Federal Tort Claims Act ("FTCA"), 28 U.S.C. §§ 2671, 1346(b) (1982). Both parties have filed extensive memoranda addressing the legal issues involved (documents 72, 78, 83, 89 and 92).

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I.

On February 28, 1980, plaintiff's decedent, Deborah D. Eisenhut, was killed while working on a military ordinance contract between her employer, an independent contractor known as Ordinance Research, Inc ("ORI"), and the U.S. Army Armament Research and Development Command ("ARRADCOM," aka "Picatinny Arsenal"). The contract was for the purchase of smoke cartridges manufactured by ORI for use in the Army's

mortar practice rounds. Deborah Eisenhut was loading a cartridge with a pyrotechnic compound known as ORI composition 119G when it exploded, killing her instantly. The incident occurred on the premises of ORI.

Composition 119G was developed in late 1979 by ORI, who owned its trade rights, in response to ARRADCOM's need for a mortar practice round that upon impact would make a flash and signature smoke. The Army used the rounds under various lighting conditions as a troop training device. It was the ignition of composition 119G within the otherwise inert mortar round that provided the flash and signature smoke.

At first, ORI sold 119G to another independent contractor, Dayron Corporation, which produced the mortar round for ARRADCOM. Later, having received samples of composition 119G from ORI for testing, ARRADCOM gave preliminary approval of 119G despite the knowledge and recommendation of some ARRADCOM personnel that its use should be discontinued due to its oversensitivity and the risk of explosion. Thereafter, on or about December 12, 1979, ARRADCOM issued a purchase order contract for 1500 smoke cartridges containing 119G for further testing. It was this contract that Deborah Eisenhut was working on at the time of her death.

In order to establish "uniform policies and procedures relating to the procurement of supplies and services under the authority of Chapter 137, Title 10 of the United States Code" the Assistant Secretary of Defense (Installations and Logistics) issued the Armed Services Procurement Regulation ("ASPR"). See ASPR § 1-101 (September 7, 1976). As a matter of policy, the safety

requirements of the "DOD Contractors' Safety Manual for Ammunitions, Explosives, and Related Dangerous Material" ("Safety Manual") were to be applied to all contracts involving ammunition and explosives. This policy was accomplished by the insertion of a prescribed safety clause into the contract. The omission of the clause and, consequently, the elimination of the requirements of the Safety Manual, must be approved by the Head of the Procuring Activity ("HPA"), in this case ARRADCOM. ASPR § 1-323.1(a),(c) (Oct. 28, 1977).

The prescribed safety clause was omitted from the ORI-ARRADCOM contract by decision of the Chief of the Support Contracting Division, Procurement Directorate, ARRADCOM. As a result, the safety requirements of the manual, which obligated both parties to observe various safety procedures, were not complied with.

ASPR § 1.323.1(c) gave ARRADCOM, as HPA, the discretion to either omit the safety clause from contracts entirely, thereby eliminating the application of the Safety Manual to the contract, or to include the clause but waive any mandatory requirements of the Safety Manual. In its discretion, ARRADCOM's policy decision was to make the requirements of the Safety Manual mandatory at all contractor owned and operated facilities *except* when orders were for an amount less than $10,000 and placed under the ASPR small purchase procedures, but only so long as those orders were for "standard commercial items" and included specific shipping instructions. *See* ARRADCOM Supplement 1 to DARCOM--R385-7 at 2 (Sep. 15, 1978) (Section 4.1 *Policy*, (a)(b)). The term "standard commercial item" was not defined.

II.

A.

ARRADCOM's determination as to the extent to which it would supervise contractor safety procedures was a basic exercise of discretionary regulatory authority. *See United States v. S.A. Empresa de Viacao Area Rio Grandense (Varig Airlines)*, 467 U.S. 797, 81 L.Ed.2d 660, 104 S.Ct. 2755 (1984). That determination required ARRADCOM to balance the safety objectives sought to be obtained by the application of the Safety Manual to munitions contracts, "against such practical considerations as staffing and funding." *Id.* at 820; Affidavit of Stella Bencel, Defendant's exhibit 5. It is undisputed that those considerations -- *i.e.*, the reduction of the high costs of administration and personnel associated with small purchase orders -- were one aim of ARRADCOM's procurement policy. *See generally* 10 U.S.C. § 2301 (1982) and as amended (1984). Furthermore, the propriety of administrative decisions regarding the expenditure of federal funds, like those regarding safety regulations, are protected discretionary acts under the discretionary function exception to the FTCA, § 2680(a). *Varig Airlines*, 467 U.S. at 809-810.

Likewise, those charged with responsibility for carrying out ARRADCOM's procurement policy in accordance with ARRADCOM's directives also are protected by the discretionary function. *Varig Airlines*, 467 U.S. at 820; *Dalehite v. United States*, 346 U.S. 15, 33, 36, 97 L.Ed. 1427, 73 S.Ct. 956 (1953). It is significant that "standard commercial item" was not defined. Inasmuch as testimony on both sides demonstrates disagreement as to what constitutes a "standard commercial item," that determinant

necessarily is not "a fixed or readily ascertainable standard" on which ARRADCOM's contracting officers could reliably act [in effecting ARRADCOM's procurement policy]. Consequently, the decisions the contracting officers make are discretionary within the § 2680(a) exception. *Alabama Electric Cooperative, Inc. v. United States*, 769 F.2d 1523, 1529 (11th Cir. 1985); *Barton v. United States*, 609 F.2d 977, 979 (10th Cir. 1979).

"Standard commercial item" was not meant to be isolated and considered in the abstract. Rather, it was meant to be considered in light of ARRADCOM's safety objectives and fiscal constraints, and left to the policy judgment of the contracting officer. It is undisputed that that is precisely what occurred in this case. *See* Deposition of George Curran, pp. 23-33, 56-65. Plaintiff's exhibit G; Affidavit of Stella Bencel, Defendant's exhibit 5. "Standard commercial item" describes an item, the safe manufacture of which ARRADOM had less interest in regulating based upon consideration of a variety of potential, unspecified economic, commercial and safety factors left within the discretion of the contracting officers. *See* Curran Deposition at 24-32, 60-65. Thus, "standard commercial item" was meant to handle not only the "black or white" cases where .22 caliber rifle bullets were being purchased, but also gray cases such as this where an understanding of ARRADCOM's policy was necessary in making the purchase decision.

The professional discretion of the contracting officers here involved economic and safety-regulatory policy considerations. The decision not to apply the Safety Manual to the ORI contract "rested on policy judgments and a balancing of practical considerations rather than scientific or technical information." *Alabama Electric Cooperative,*

769 F.2d at 1529, n.2. Whether or not those officers negligently exercised or abused their discretion is irrelevant. *Dalehite*, 346 U.S. at 33-34.

The case of *McMichael v. United States*, 751 F.2d 303 (8th Cir. 1985), upon which plaintiff chiefly relies, is inapposite. There the government had already "exercised its discretion to adopt safety rules and to conduct safety inspections" by applying the Safety Manual to the contract and mandating the continuous presence of three onsite safety inspectors performing a 51 step safety compliance review. *Id.* at 305. Moreover, in its previous opinion in the same case the same court agreed "that the awarding of the government contract and the promulgating of the [Safety Manual] are exempt discretionary functions" because they "were planning level decisions involving the weighing of various facts and policies and, hence, the United States is not liable under the FTCA even if the responsible government employees performed their duties negligently." *Madison v. United States*, 679 F.2d 739 (8th Cir. 1982).

Accordingly, to the extent that the plaintiff's claim is for the negligent failure of the Army to apply and enforce the provisions of the Safety Manual, it is barred by 28 U.S.C. § 2680(a).

B.

Under Florida law, an employer's duty to halt work or remove the danger that the employer discovers has been created by his independent contractor, is a duty that has been limited to persons other than the contractor's employees. *Lowe v. United States*, 466 F. Supp. 895 (M.D. Fla. 1979), *affirmed*, 611 F.2d 76 (5th Cir. 1980). Furthermore, even if the provisions of the Safety Manual had

been applied to the ORI contract, notification of noncompliance with them as well as the manner of enforcement was discretionary, not mandatory. Moreover, the safety of ORI employees and property was the sole responsibility of ORI. *See* Safety Manual, § 103, Plaintiff's exhibit 8; ASPR § 7-104.79, prescribed safety clause at (b) and (d), Plaintiff's exhibit 9. The mere retention of the right to require adherence to safety regulations or to conduct safety inspections does not impose liability upon the United States. *Lowe*, 466 F. Supp. at 899, 611 F.2d at 77; *Johnston v. United States*, 461 F. Supp. 991 (N.D. Fla. 1978), *affirmed*, 603 F.2d 858 (5th Cir. 1979); *Accord*, *LeSeur v. United States*, 617 F.2d 1197 (5th Cir. 1980).

Likewise under Florida law, an employer is not liable to an independent contractor's employees even though they are engaged in inherently dangerous activity, absent an act of negligence by the employer independent of his relationship with the independent contractor. *Florida Power and Light v. Price*, 170 So.2d 293 (1964); *Crawford v. Florida Steel*, 478 So.2d 855 (Fla. 1st DCA 1985). However, in this case the Army owed no duty to Deborah Eisenhut, the breach of which would constitute a cause of action for negligence under Floria law.

ARRADCOM owed Ms. Eisenhut no affirmative duty to take special precaution against the dangers involved in her work. *See Scofi v. McKeon Construction Co*, 666 F.2d 170 (5th Cir. 1982), nor was Ms Eisenhut an invitee. *Compare*, *Orr v. United States*, 486 F.2d 270 (5th Cir. 1973) (Government owed a duty to plaintiff as invitee on Patrick Air Force Base). *Toole v. United States*, 588 F.2d 403 (3rd Cir. 1978) is inapposite because it construes Pennsylvania law which imposes such an affirmative duty on employers of independent contractors.

Furthermore, because the Safety Manual was not applied to the ORI contract, the Army owed Ms. Eisenhut no duty regarding the enforcement of safety regulations, nor did the product quality inspection by ARRADCOM's Quality Assurance Specialist at the ORI plant, without more, constitute an assumption of a duty to enforce safety regulations or warn of safety violations. *See Skow v. Department of Transportation*, 468 So.2d 422 (Fla. 1st DCA 1985); *Compare, McMichael v. United States*, 751 F.2d 303 (8th Cir. 1985) (duty existed where there was continuous presence of three on-site inspectors performing 51 step safety compliance review in addition to inclusion of Safety Manual in the contract).

Finally, it is undisputed that ARRADCOM exercised no supervisory control over Ms. Eisenhut's work at ORI, *See Padilla v. Gulf Power Co.*, 401 So.2d 1375 (Fla. 1st DCA 1981), and that ARRADCOM had no superior knowledge of danger as an owner of premises. *See Horton v. Gulf Power Co.*, 401 So.2d 1384 (Fla. 1st DCA 1981). Thus, under Florida law ARRADCOM had no duty to Deborah Eisenhut based upon one of the recognized exceptions to the general rule that the employer of an independent contractor owes less duties to the latter's employees than to third persons. *Price*, 170 So.2d at 297.

Accordingly, to the extent that the plaintiff's claim is for the negligent failure of the Army to warn Deborah Eisenhut of danger, it fails to state a claim upon which relief can be granted. Furthermore, even if such a claim could be stated under Florida law, it too would be barred by Section 2680(a) because it ultimately attacks the discretionary regulatory authority the government has with respect to the supervision of its contractors' safety procedures. *See Varig Airlines, supra.*

C.

Plaintiff also claims that the government negligently misclassified the hazard factor for composition 119G. Amended Complaint at J,K. However, the gravamen of that claim is that ARRADCOM communicated misinformation -- *i.e.*, that 119G was not sensitive or explosive in nature -- on which ORI relied, and that, but for the government's misrepresentations, ORI would have taken precautions that would have prevented Deborah Eisenhut's death. Plaintiff's Memorandum Opposing Summary Judgment at 5,7,30,43; Plaintiff's Supplementary Memorandum at 1,2,7; Waite Deposition, Vol. I at 118-121; Waite Deposition Vol. III at 15-23, 41-43. Thus, because the plaintiff's damages are attributed solely to ORI's reliance on ARRADCOM's alleged misrepresentation, the claim is barred by the misrepresentation exception to the FTCA, Section 2680(h). *Block v. Neal*, 460 U.S. 289, 75 L.Ed.2d 67, 103 S.Ct. 1089 (1983); *Baroni v. United States*, 662 F.2d 287 (5th Cir. 1981).

National Carriers, Inc. v. United States, 755 F.2d 675 (8th Cir. 1985) is inapposite because the claim there was not based solely on misrepresentation, but on other distinct acts of operational negligence which themselves caused damages to the plaintiff independent of those caused by misrepresentation. Likewise, *Aretz v. United States*, 604 F.2d 417 (5th Cir. 1979), is distinguishable because the misrepresentation exception, Section 2680(h), was not in issue there. Furthermore, *Aretz* involved a munitions contract which applied the Safety Manual, and which specifically classified the loose pyrotechnic compounds used in the manufacturing process, not just the end item for transportation purposes. The claim was

predicated "on the Army's failure to implement its decision to upgrade the classification of pyrotechnic materials," *id* at 426, not on the plaintiff's reliance on government misinformation. Finally, *Aretz* was also based on a duty under Georgia law that recognized no difference between third persons and employees of independent contractors, and that extended to the manufacturing of the end product, not just the subsequent transportation and storage of the end product. *Id.* at 428-29.

Plaintiff has failed to produce preponderant evidence that damages were suffered independent of ORI's reliance upon the government's alleged misinformation sufficient to allow a reasonable jury to return a verdict for him. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. ___, 91 L.Ed.2d 202, 106 S.Ct. 2505 (1986).

Accordingly, the defendant's motion for summary judgment (document 71) is hereby GRANTED. Clerk will enter judgment.

DONE and ORDERED this 23rd day of December, 1986.

/s/ William Stafford
WILLIAM STAFFORD
CHIEF JUDGE

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA

MARION F. COLE

V.

UNITED STATES OF AMERICA

JUDGMENT IN A CIVIL CASE

CASE NUMBER: PCA 83-4106

[ ] Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

[x] Decision by Court. This action came before the Court. A decision has been rendered.

IT IS ORDERED AND ADJUDGED.

The defendant's motion for summary judgment is hereby Granted.

December 24, 1986
Date

/s/ MARVIN S. WAITS
Clerk

/s/ Sheila Hurst-Rayborn
(By) Deputy Clerk

Marion F. COLE, Personal Representative
of the Estate of Deborah D. Eisenhut, Deceased,
Plaintiff-Appellant,

v.

UNITED STATES of America,
Defendant-Appellee.

No. 87-3049.

United States Court of Appeals,
Eleventh Circuit.

June 10, 1988.

Estate of deceased employee of Army contractor brought suit under Federal Tort Claims Act. Government moved for summary judgment. The United States District Court for the Northern District of Florida, No. PCA 83-4106-WS, William Stafford, Chief Judge, 651 F.Supp. 221, granted Government's motion. On appeal, the Court of Appeals, Tjoflat, Circuit Judge, held that: (1) Army was not liable under FTCA for violation of alleged duty to warn where manufacturer was aware of one possible cause of explosion and took safety measures to prevent it, and neither Army nor manufacturer were aware of second, and (2) under Florida law, Army owed no duty as employer to independent contractor's employee.

Affirmed.

Appeal from the United States District Court for the Northern District of Florida.

Before TJOFLAT and ANDERSON, Circuit Judges, and MOORE*, District Judge.

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* Honorable John H. Moore, II, U.S. District Judge for the Middle District of Florida, sitting by designation.

TJOFLAT, Circuit Judge:

This is an appeal from a summary judgment entered in behalf of the United States in a wrongful death suit brought under the Federal Tort Claims Act, 28 U.S.C. §§ 1346, 2671-2680 (1982), 651 F.Supp. 221. We affirm.

I.

A.

On February 28, 1980, an explosion occurred in the laboratory of Ordnance Research, Inc. (ORI), an explosives and pyrotechnics manufacturer, and took the life of appellant's decedent, a laboratory technician. At the time, ORI was performing a contract for the United States Army Armament Research and Development Command (ARRADCOM). Appellant claims that ARRADCOM's negligence caused the accident, and she seeks money damages in behalf of her decedent's estate. The following facts provide the context, for appellant's claim.

Sometime prior to March 1978, the Army requested ARRADCOM to develop for use in troop training a harmless practice mortar round that would produce a flash and smoke on striking its target. In processing this request, ARRADCOM turned to independent contractors for the development and manufacture of the powder needed to produce the flash and smoke and the fuze required to ignite the powder. ARRADCOM chose Dayron Corporation to make the fuze, and ORI to make the powder.

In March 1978, ARRADCOM asked ORI, which had been doing business with the Army for over a decade, if it would be willing to develop, at its own cost, a smoke

powder for use in practice mortar rounds. ARRADCOM told ORI that if it developed the powder, the composition of which would remain an ORI trade secret, ARRADCOM would test the powder and if satisfied with the results of the test would purchase from ORI the powder requirements for the practice rounds.

ORI decided to undertake the project, and by August 1978, after experimenting with nineteen formulations of smoke powder, finally arrived at a compound, called "119A," that it thought would be acceptable. ORI submitted the compound to ARRADCOM for testing, and on August 21, 1978, ARRADCOM gave ORI a purchase order for 1000 cartridges (ordinary shotgun shells) loaded with 119A. ORI filed the purchase order and submitted the cartridges to ARRADCOM for testing. ARRADCOM was not satisfied with the performance of the cartridges and requested ORI to revise its formula. Over the next several months, ORI prepared several variations of 119A, called successively "119B, C, D, E, and F," and sent some of them to ARRADCOM for testing.

In testing 119B and C, ARRADCOM found that the compounds emitted a poisonous gas, phosphine, and communicated this fact to ORI. ORI doubted ARRADCOM's finding, but nonetheless developed a new compound, called "119G," and sent it to ARRADCOM. ARRADCOM tested 119G, found that the poison gas problem had been eliminated, and on December 12, 1979, gave ORI a purchase order for 1500 smoke cartridges, 1300 containing 119G and 200 containing 119A, for further testing by ARRADCOM.

Appellant's decedent, Deborah Eisenhut, was a technician in ORI's laboratory. She had handled ARRADCOM's previous purchase orders for cartridges, personally preparing the compound and filling the cartridges with the smoke powder,[1] and ORI gave her the task of handling ARRADCOM's December 12 purchase order. Ms. Eisenhut began processing the order in January 1980, and by February 28, 1980, she had filled most of the 119A and G cartridges ARRADCOM was purchasing. On that day, at 10:30 a.m., while Ms. Eisenhut was alone in the laboratory loading some cartridges with compound 119G, an explosion occurred, killing her. A fire followed the explosion and destroyed the laboratory.

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1. The procedure followed by Ms. Eisenhut to prepare the compound and fill the cartridges was as follows. First, she would begin in the chemical laboratory where she would weigh the compound's ingredients. She would then place the ingredients in a metal container and proceed to the blend building. Next, she would charge a ceramic ball jar with the composition, carefully seal the ball jar, making sure that the jar's lid was clean, place the ball jar on the ball mill turning device, and turn on the ball mill. After thirty minutes, she would take the ball jar off the ball mill, ground herself to the work bench station by using a Wriststat, and then place the ball jar on a grounded Velostat for at least ninety seconds. Next, she would open the ball jar and scoop out, with a metal scoop, 200 to 300 grams of the composition and place it into a metal container. She would reseal the ball jar, and carry the metal container into the laboratory. Again wearing a Wriststat, she would use a metal scoop to remove the composition from the container, weigh out 10.5 gram lots of the composition, and fill each of ten shells with that amount.

B.

Marion Cole, the appellant, is the personal representative of Ms. Eisenhut's estate. Cole filed a claim with the Department of the Army on behalf of the estate, the beneficiaries of Ms. Eisenhut's death under Florida's wrongful death act, Fla.Stat. §§ 768.16-27 (1986), and North River Insurance Company, Inc., ORI's worker's compensation insurance carrier, alleging that ARRADCOM's negligence caused Eisenhut's death and seeking $10 million in damages. The Department of the Army rejected Cole's claim, and she filed this wrongful death suit in the district court under the Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 1346(b), and 2671-2680 (1982).[2]

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2. Section 1346(b) provides:

> Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

Section 2674 provides:

> The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

> If, however, in any case wherein death was caused, the law of the place where the act or omission complained of occurred provides, or has been construed to provide, for damages only punitive in nature, the United States shall be liable for actual or compensatory damages, measured by the pecuniary injuries resulting from such death to the persons respectively, for whose benefit the action was brought, in lieu thereof.

Appellant's complaint[3] is a rambling, "shotgun" pleading,[4] framed in one count. The complaint sets forth every act, whether committed by ARRADCOM,[5] Ms. Eisenhut, her coemployees at ORI, or anyone else, which, in the pleader's mind, may have had a causal relationship to the explosion that produced Ms. Eisenhut's death; the complaint, however, does not state what triggered the explosion. It simply alleges that an explosion occurred on ORI's premises while its employees, Ms. Eisenhut among them, were performing a contract for ARRADCOM that required them to handle certain "ultrahazardous materials or mixtures," and that ARRADCOM is liable for Ms. Eisenhut's resulting death because it was "negligent."

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3. This reference, as well as the other references in the opinion to appellant's complaint, is to appellant's amended complaint. This was the complaint before the district court when it granted summary judgment.

4. The Federal Rules of Civil Procedure condemn such pleadings. *See* Fed.R.Civ.P. 8(a) & (e).

5. In this opinion, ARRADCOM refers to the United States of America, the appellee, and to all of the Department of Army personnel implicated in this case.

Two theories of liability emerge from a reading of appellant's complaint. The first is that ARRADCOM is responsible for Ms. Eisenhut's death because it contracted with ORI for the production of "ultrahazardous material,"[6] had "superior knowledge" that Ms. Eisenhut would be "exposed" to "inherent and probable danger" "in working with" the material, and "failed to communicate with or warn" Ms. Eisenhut of such danger.

The second theory of liability is that ARRADCOM is responsible for Ms. Eisenhut's death because it assumed ORI's responsibility of providing her a safe place to perform the contract work. We draw this theory from the following allegations of the complaint, which we quote in part and rearrange in numbered paragraphs for purposes of analysis:

1. On December 12, 1979, ARRADCOM, using a purchase order, contracted with ORI for the production of "ultrahazardous material." Because the production of such material would constitute "inherently dangerous" or "ultrahazardous" work, ARRADCOM inspected the safety of ORI's production facilities and determined that they were safe before issuing the purchase order. After it issued the purchase order, ARRADCOM monitored ORI's performance of the contract, to ensure that ORI complied with its terms. In addition, ARRADCOM voluntarily assumed ORI's responsibility to provide its employees,

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6. The complaint makes no reference to compound 119G, the material involved in the explosion. It is undisputed, however, that the "ultrahazardous material" was compound 119G.

including Ms. Eisenhut, a safe place to do the contract work. Thus, if ARRADCOM observed an unsafe condition in the work place, it could order ORI to eliminate the condition or, if necessary, shut down the job.

2. Prior to the accident of February 28, 1980, ARRADCOM knew, or in the exercise of reasonable care should have known, that ORI's employees, including Ms. Eisenhut, were performing the contract work "in a grossly negligent or ultra-dangerous manner so as to expose [them] to threat of serious bodily injury or death." Specifically, ORI's employees:

(a) were performing the contract work and "loading and handling" "ultrahazardous materials and mixtures" "in an unapproved and unsafe working area" and "without the benefit of safety protection," including a shield, in clear violation of "the methods which had been approved for such loading and handling," the Department of Defense Contractors' Safety Manual for Ammunition, Explosives and Related Dangerous Material, and all safety standards prescribed for activity involving such ultrahazardous materials and "mixtures";

(b) "were allowed to handle static sensitive materials in areas which were non-conductive, in containers made of non-conductive materials, and wearing clothing that could be ignited by static discharge from the human body";

(c) "were allowed to stockpile unsafe quantities of ultrahazardous materials and mixtures at or near the loading [and/or working] area," where "[u]nauthorized and unnecessary personnel were allowed to enter" and "[u]nnecessary and unsafe equipment was placed,"

"thereby causing the imminent danger of fire and/or explosion"; and

(d) "were allowed to take coffee breaks at or near the loading and/or working area," "where the coffee maker for employee coffee breaks was kept."

3. ARRADCOM failed to eliminate the unsafe conditions set forth in paragraph 2 above, and its failure caused Ms. Eisenhut's death.

The Government, in answering the amended complaint, denied the material allegations of appellant's negligence claim and raised several affirmative defenses, none of which is relevant to our discussion. After the parties engaged in extensive discovery, the Government moved for summary judgment. The court granted the motion, concluding that the record failed to disclose any evidence of negligence on ARRADCOM's part, and appellant lodged this appeal.

II.

In her complaint in the district court and in her briefs to us, appellant implies that she can recover money damages against ARRADCOM without proving the *cause* of the accident that took her decedent's life; all she needs to prove is that the fatal explosion occurred and that ARRADCOM committed one or more of the acts of misconduct enumerated in her complaint. Appellant apparently believes that such proof would establish causation as a matter of law. Accordingly, ARRADCOM is liable under her first theory of recovery if she shows that it possessed knowledge superior to ORI's that the "ultrahazardous" material, i.e., compound 119G, Ms. Eisenhut

was working with at the time of the accident presented a substantial danger to her safety but failed to warn her of such danger–whether or not the warning would have prevented the accident. ARRADCOM is liable under her second theory of recovery if its conduct rendered Ms. Eisenhut's work place unsafe–whether or not such conduct caused the accident.

Reduced to their essentials, the theories of appellant's complaint appear to be species of strict liability: ARRADCOM may be required to respond in money damages even if its "negligence" did not *cause* the accident. If they are, appellant cannot recovery under the FTCA; an FTCA claimant cannot prevail unless the claimant proves that the allegedly "negligent or wrongful act or omission" actually "caused" the injury sustained. *See* 28 U.S.C. § 1346(b) (1982); *Dalehite v. United States*, 346 U.S. 15, 44-45, 73 S.Ct. 956, 972-73, 97 L.Ed. 1427 (1953).[7]

Even if we were to assume that appellant's theories of liability contain a causation element, thus requiring her to demonstrate that ARRADCOM's alleged misconduct caused the laboratory explosion, she cannot avoid summary judgment. Under Florida law, which provides

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7. Appellant cites no Florida cases, and we are aware of none, that would permit her to recover without establishing that ARRADCOM's misconduct caused the explosion. Appellant does not suggest that ARRADCOM's responsibility for the explosion has been established circumstantially under the doctrine of *res ipsa loquitur*, a doctrine obviously inapplicable on the facts here.

the rule of decision in this case,[8] ARRADCOM had no *duty* either (1) to warn Ms. Eisenhut that the manner in which she was handling compound 119G might produce a fatal explosion, or (2) to ensure, by providing a safe place to work, that such an explosion would not occur.

A.

Appellant cites no cases from Florida or any other jurisdiction, and we have found none, which hold that a purchaser of goods from the manufacturer thereof has a duty to warn the manufacturer and its employees of any danger that may attend the manufacture of the goods–even where the goods are, as appellant alleges, "ultra-hazardous" and are "inherently dangerous" to produce, and the purchaser has "superior knowledge" of such facts *and* knows, or has reason to believe, that the manufacturer lacks such knowledge.[9] Nonetheless, we have

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8. The rule of decision in an FTCA case is provided by the law of the state where the "act or omission occurred." *See* 28 U.S.C. § 1346(b) (1982). The alleged negligence in this case occurred in Florida; thus, Florida law governs.

9. Appellant cites several cases which she contends support the proposition that a purchaser of goods from the manufacturer thereof has a duty to warn the manufacturer and its employees of any danger that may attend the manufacture of the goods. They are not persuasive. Some are federal cases, applying Florida law, that relate to the duty the employer of an independent contractor may have to a *third party*, rather than the contractor's employees. *See, e.g., Emelwon, Inc. v. United States*, 391 F.2d 9 (5th Cir.), *cert. denied*, 393 U.S. 841, 89 S.Ct. 119, 21 L.Ed.2d 111 (1968); *H.L. Properties*

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assumed, for the sake of argument, that the Florida courts would adopt a rule requiring a purchaser possessing knowledge superior to that of the manufacturer concerning the hazardous nature of the goods and the danger

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Inc. v. Aerojet-General Corp., 331 F.Supp. 1006 (S.D. Fla. 1971), *aff'd*, 468 F.2d 1397 (5th Cir. 1972). These cases are plainly inapposite.

Other cases appellant cites relate to the duty one owes to an independent contractor he has invited onto his premises or furnished an instrumentality. *See, e.g., Scofi v. McKeon Const. Co.*, 666 F.2d 170 (5th Cir. 1982); *Florida Power & Light Co. v. Price*, 170 So.2d 293 (Fla. 1964). In these cases, the courts seek to determine whether the owner had knowledge, superior to that possessed by the independent contractor or its employees, about a danger such employees faced while working on the premises or with the instrumentality. These cases, too, are inapposite. Here, the contract work was performed on ORI's, not ARRADCOM's, premises, and ARRADCOM furnished ORI no instrumentality.

Appellant cites FTCA cases not applying Florida law which, at first blush, appear to support her position. *See, e.g., Aretz v. United States*, 604 F.2d 417 (5th Cir. 1979) (interpreting Georgia law), *vacated*, 616 F.2d 254 (5th Cir. 1980), *reinstated*, 660 F.2d 531 (Former 5th Cir. Nov. 1981) (en banc); *Toole v. United States*, 588 F.2d 403 (3d Cir. 1978) (interpreting Pennsylvania law). A careful reading of those cases reveals, however, that the duty imposed on the Government was grounded in contract; by the contract, the Government assumed a duty to provide safe working conditions for its contractors' employees. Such is not the case here; the December 12 purchase order imposed no express duty on the Government to provide Ms. Eisenhut a safe place to work, and as explained in Part II.B. of this opinion, Florida law did not imply such a duty.

inherent in their production to communicate such knowledge to the manufacturer and its employees *if* the purchaser knows or has reason to believe that they lack such knowledge. And, with this assumption in mind, we have examined the record for evidence that ARRADCOM had knowledge, which it knew or had reason to believe was not possessed by ORI and Ms. Eisenhut, that the manner in which Ms. Eisenhut was handling compound 119G might cause the compound to explode. As the following discussion indicates, the inference cannot be made that ARRADCOM possessed such knowledge.

The record contains only two explanations as to the cause of the explosion; both relate to the manner in which Ms. Eisenhut was handling compound 119G. The first explanation is provided by Dr. Hal Waite, ORI's chief chemist; the other comes from the Government's expert, John Conkling, a chemist specializing in pyrotechnics. According to Dr. Waite, in a letter written to ARRADCOM a few days after the accident, static electricity, which accumulated on Ms. Eisenhut's body as she loaded the cartridges with smoke powder, ignited the powder. He said that moments before the explosion, Ms. Eisenhut was seen not wear her "grounding Wriststat," as required by ORI's safety procedures; had she been wearing the device, the accident probably would not have occurred. Dr. Waite indicated that Ms. Eisenhut's failure to wear the device made it possible for the static electricity on her body to be transmitted to the compound, the very thing the Wriststat was designed to avoid.

John Conkling's explanation differed from Dr. Waite's. According to Conkling, the high degree of humidity present in the atmosphere at the time of the

explosion made it unlikely that static electricity triggered the event; humid air, he observed, is a poor conduit for static electricity. Conkling's theory, which, unlike Dr. Waite's, is based on possibility rather than probability, is that the explosion occurred as Ms. Eisenhut, using a metal scoop, was removing compound 119G from a one-quart container, which contained 200-300 grams of the powder, so that she could measure the compound into 10.5 gram portions for insertion into the cartridges.[10] The movement of the scoop through the powder created friction which may have produced heat sufficient to ignite the powder. Conkling stated that the ignition of 200-300 grams of 199G in a one-quart container could easily produce a catastrophe of the magnitude of the one in this case. According to Conkling, at the time of the accident, it was well known in the pyrotechnics industry that the ingredients of 119G, blended pursuant to ORI's formulation, were "prone to accidental ignition" and were "quite energetic"; moreover, in a powder state, they were in their "most sensitive and energetic form." Conkling added that any pyrotechnic specialist of Dr. Waite's qualifications and experience would have known this.

The record indicates that ARRADCOM, ORI, and Ms. Eisenhut knew the following about the static electricity problem described by Dr. Waite and the friction-heat problem discussed by Conkling. With respect to the first problem, ARRADCOM knew before it gave ORI the purchase order on December 12, 1979 that ORI would require the employee processing the order to wear conductive

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10. *See supra* note 1.

shoes and a Wriststat grounding device when working with the 119A and G compounds. ARRADCOM learned this when its safety inspector examined ORI's plant on August 2, 1979,[11] and Dr. Waite showed him how the smoke powder would be handled. A reasonable trier of fact could infer from this that ARRADCOM was aware from the outset that static electricity posed a safety problem. At the same time, ARRADCOM must have had good reason to believe that ORI would invoke appropriate safety prcedures to eliminate the problem. Dr. Waite apparently gave ARRADCOM's inspector sufficient assurances in this regard, because the inspector advised his superiors that ORI could produce the smoke powder in a safe manner.

ORI and Ms. Eisenhut knew as much if not more than ARRADCOM abount the danger posed by static electricity. Both knew that static electricity could ignite the smoke powder and cause it to explode with lethal force. To avoid this risk, ORI had a safety regulation that required Ms. Wisenhut to wear conductive shoes and a grounding device, the Wriststat, on her wrist while handling smoke powders. That Ms. Eisenhut was aware of this requirement and its purpose there can be no doubt. A couple of weeks before the accident, one of her superiors

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11. ARRADCOM examined ORI's plant on August 2, 1979 as part of its inspection of Dayron Corporation's facilities. At the time, ARRADCOM contemplated contracting with Dayron to produce both the smoke powder and the fuzes; Dayron, in turn, planned to have ORI produce the smoke powder under a subcontract. Before deciding whether to contract with Dayron, ARRADCOM conducted a routine "pre-award survey" of the facilities of both companies.

caught her working with compound 119G without her Wriststat on and gave her a strong reprimand; he reminded her that if static electricity came into contact with the powder, it could trigger an explosion violent enough to kill her. Inexplicably, Ms. Eisenhut repeated her mistake a few days later, and she died as a result.

With respect to the friction-heat problem, the record contains nothing. No evidence has been presented suggesting that ARRADCOM knew anything about this problem; the same is true regarding ORI and Ms. Eisenhut.

In sum, the record before us firmly precludes the inference, on summary judgment, that ARRADCOM had "superior knowledge," which it had a duty to communicate to ORI and Ms. Eisenhut, concerning the hazards that could have triggered the explosion in this case.[12]

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12. In her brief on appeal, appellant cites two internal memoranda written by Ronald Nitzsche, assistant to the chief of ARRADCOM's Tube Fired Fuze Branch which had performed laboratory tests on compounds 199B and C. Appellant contends these memoranda establish ARRADCOM's superior knowledge or at least preclude summary judgment. We are not persuaded.

On December 6, 1979, six days before ARRADCOM issued the purchase order Ms. Eisenhut was working on when the accident occurred, Nitzsche wrote to ARRADCOM personnel responsible for the practice mortar round project and stated that compounds 119B and C "are considerably more sensitive than the ARRADCOM smoke" (presumably a smoke powder ARRADCOM's chemists had developed), and recommended that "[i]n the interest of maximum troop

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Thus, even if the Florida courts would accept appellant's duty to warn theory of recovery, her claim fails.

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safety," ARRADCOM not purchase either compound from ORI.

In a January 15, 1980 memorandum, written before the Tube Fired Fuze Branch submitted compound 119G to laboratory analysis, Nitzsche opined that by using perchlorates instead of nitrates in making compound 119G, ORI had minimized the possibility of phosphine gas formation. Nitzsche added, however, that the perchlorates "should increase the sensitivity [of compound 119G] over the previous compositions [i.e., 119B and C] which are already considered overly sensitive for the proposed practice fuze applications [and are] extremely sensitive and hazardous for use in practice ammunition." Nitzsche questioned, in passing, whether any of ORI's smoke powders could be "manufactured and loaded into practice items under high volume conditions without items under high volume conditions without risk of catastrophic fire and/or explosion" and "strongly recommend[ed] that the ORI Composition be abandoned in favor of the ARRADCOM Composition."

Fairly read, Nitzsche's memoranda express two concerns: ORI's compounds might present an undue hazard to the troops in the field and to those involved in their manufacture under "high volume conditions." The only explanation Nitzsche gave for his opinion is that ORI's compounds were "overly sensitive for the proposed practice fuze applications" and "extremely sensitive . . . for use in practice ammunition." The memoranda reveal nothing about the manner in which ORI had been manufacturing its compounds or processing ARRADCOM's purchase orders. Nor do they reveal that ARRADCOM knew of the static electricity and friction-heat problems, described by Dr. Waite and John Conkling, which are the only explanations of the explosion contained in the record before us.

B.

Appellant's second theory is that ARRADCOM voluntarily assumed ORI's obligation to provide Ms. Eisenhut a safe place to work, failed to make such provision, and therefore caused her death. Appellant contends that ARRADCOM assumed this obligation because ARRADCOM (1) inspected the safety of ORI's production facilities and determined that they were safe before it gave ORI the purchase order for the 119A and G cartridges; (2) monitored ORI's performance of the contract to ensure that ORI complied with its terms; and (3) if it observed an unsafe condition in the work place, had a contract right to order ORI to eliminate the condition or, if necessary, cease further performance of the contract work.

The Florida courts would not recognize a duty to provide a safe place to work in the circumstances at hand. *See Skow v. Department of Transp.*, 468 So.2d 422 (Fla. Dist.Ct.App.1985); *see also Swartz v. Ford, Bacon & Davis Constr. Corp.*, 469 So.2d 232, 233 (Fla.Dist.Ct.App.1985). *Skow* is squarely on point. There, the First District Court of Appeal, affirming a summary judgment, rejected the precise argument appellant presents in this case. We quote at some length from the court's opinion.

> Timmy Skow, an employee of Capelletti Brothers, Inc., was injured while working on a bridge being constructed under a contract between Capelletti Brothers (Capelletti), the contractor, and the Department of Transportation (DOT). Skow was working high above the river without a safety belt when he lost his footing, slipped, and grabbed a pile driver,

which crushed his hand. He and his wife . . . appeal a final summary judgment for DOT on their claim for personal injury damages. We affirm.

Appellants argue that DOT owed Timmy Skow a legal duty to eliminate unsafe working conditions that it knew or should have known would expose workers to a substantial risk of harm. Notwithstanding the general rule that one who hires an independent contractor is not liable for injuries sustained by that contractor's employees in their work, *Van Ness v. Independent Construction Co.*, 392 So.2d 1017 (Fla. 5th DCA 1981), appellants argue that a legal duty arose because DOT assumed such detailed control over the work that the independent contractor relationship between DOT and Capelletti ceased to exist. Additionally, appellants assert that Timmy Skow's work was inherently dangerous, that he was allowed to work without a safety belt, and that DOT breached its duty to enforce the requirements of the Capelletti/DOT contract and federal safety regulations by failing to require Capelletti to provide bridge workers with safety belts.

The undisputed facts in the record support the conclusion that although DOT actively participated in the inspection of work done by Capelletti, this was done only to ascertain the results of the work and not to control the method of performance or to ensure Capelletti's compliance with safety regulations. DOT provided supervision only in the sense that its inspectors generally observed the work for compliance with the contract. The several instances of specific instruction given by DOT employees to

> Capelletti's employees constituted general supervision in this sense and did not amount to an exercise of control by DOT that is legally sufficient to take this case out of the general rule of *Van Ness, supra.*
>
> Although the contract provided that Capelletti would comply with all applicable state and federal laws governing safety and provide safeguards and safety equipment for its employees, and provided that DOT had authority to shut down the job site for Capelletti's breach of this requirement, the contract did not impose an explicit duty on DOT to monitor, inspect, and correct violations by Capelletti. There is no indication in this record that DOT, as owner, created or contributed to the dangerous condition alleged to have caused Timmy Skow's injuries.
>
> Since appellants' cause of action is not predicated on a showing that "the contracting owner by positive act of negligence or negligent omission on his part caused injury" to the independent contractor's employee, *Florida Power & Light Co. v. Price,* 170 So.2d 293, 297 (Fla. 1964), no duty, delegable or nondelegable, was owed by DOT to Timmy Skow. *Ibid; Conklin v. Cohen,* 287 So.2d 56 (Fla.1973); *Van Ness v. Independent Construction Co., supra.*

Skow, 468 So.2d at 423-24.

Skow disposes of every material aspect of appellant's argument that ARRADCOM assumed ORI's duty to

provide Ms. Eisenhut a safe place to work.[13] Accordingly, her argument fails.

III.

In summary, appellant's claim that ARRADCOM owed Ms. Eisenhut a duty which it breached, thus causing her death, is without merit. The judgment of the district court is therefore

AFFIRMED.

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13. In her memorandum to the district court in opposition to ARRADCOM's motion for summary judgment and in her brief to us, appellant suggests that ARRADCOM was liable because it "negligently" failed to put a provision in the purchase order for the cartridges requiring ORI to comply with the Department of Defense "Contractors' Safety Manual for Ammunition, Explosives, and Related Dangerous Material." The provision would have required, among other things, that ORI make Ms. Eisenhut do exactly what ORI's safety procedures mandated, i.e., wear conductive shoes and other grounding devices. Appellant reasons that if ARRADCOM had inserted this provision in the purchase order, ORI would have given Ms. Eisenhut's work closer scrutiny and the accident would not have occurred. Appellant cites no authorities from Florida or elsewhere that would hold that ARRADCOM owed Ms. Eisenhut a duty to insert the provision in the purchase order, and we have no reason to believe that the Florida courts would reach such a holding.

The district court rejected this particular allegation of negligence on the ground that the alleged act of misconduct constituted a discretionary act which is not actionable under the "discretionary function exception" of the FTCA. *See* 28 U.S.C. § 2680(a) (1982). In view of our disposition, we need not reach this discretionary function issue.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 87-3049

MARION F. COLE, Personal Representative of the Estate of Deborah D. Eisenhut, Deceased,

Plaintiff-appellant,

versus

UNITED STATES OF AMERICA,

Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Florida

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ON PETITION(S) FOR REHEARING
(filed August 4, 1988)

BEFORE: TJOFLAT and ANDERSON, Circuit Judges, and MOORE*, District Judge.
PER CURIAM:

The petition(s) for rehearing filed by appellant is denied.

ENTERED FOR THE COURT:

/s/ illegible
United States Circuit Judge

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*Honorable John H. Moore, II, U.S. District Judge for the Middle District of Florida, sitting by designation.

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 87-3049

D.C. Docket No. 83-4106

MARION F. COLE, Personal Representative of the Estate of Deborah D. Eisenhut, Deceased,

Plaintiff-Appellant,

versus

UNITED STATES OF AMERICA,

Defendant-Appellee.

Appeal from the United States Court for the Northern District of Florida

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Before TJOFLAT and ANDERSON, Circuit Judges, and MOORE*, District Judge.

JUDGMENT
(filed Aug. 12, 1988)

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Florida, and was argued by counsel;

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*Honorable John H. Moore, II, U. S. District Judge for the Middle District of Florida, sitting by designation.

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby, AFFIRMED;

It is further ordered that plaintiff-appellant pay to defendant-appellee, the costs on appeal to be taxed by the Clerk of this Court.

Entered: June 10, 1988
For the Court: Miguel J. Cortez, Clerk

By: /s/ Warren A. Godfrey
Deputy Clerk

ISSUED AS MANDATE: August 12, 1988

(2)

Supreme Court, U.S.
FILED
NOV 7 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-406

In the Supreme Court of the United States

OCTOBER TERM, 1988

MARION F. COLE, PERSONAL REPRESENTATIVE OF THE ESTATE OF DEBORAH D. EISENHUT, DECEASED, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
Solicitor General
JOHN R. BOLTON
Assistant Attorney General
JEREMY PAUL
Attorney
Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether the courts below erred in granting summary judgment to the United States on the ground that Florida law imposes no duty upon the employer of an independent contractor to supervise safety at the contractor's premises.

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In the Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-406

MARION F. COLE, PERSONAL REPRESENTATIVE OF THE ESTATE OF DEBORAH D. EISENHUT, DECEASED, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 12a-32a) is reported at 846 F.2d 1290. The opinion of the district court (Pet. App. 1a-10a) is reported at 651 F. Supp. 221.

JURISDICTION

The judgment of the court of appeals (Pet. App. 34a-35a) was entered on June 10, 1988. A petition for rehearing was denied on August 4, 1988 (Pet. App. 33a). The petition for a writ of certiorari was filed on September 7, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner is the personal representative of Deborah Eisenhut, an employee of Ordnance Research, Inc. (ORI),

who was killed in an explosion at an ORI laboratory in Fort Walton Beach, Florida. When the explosion occurred, Ms. Eisenhut was loading smoke cartridges with an ORI compound known as 119G. ORI was manufacturing 119G purusant to a contract with the U.S. Army Armament Research and Development Command (ARRADCOM) that called for ARRADCOM to purchase 1,500 cartridges from ORI at a total cost of less than $10,000. ORI had developed 119G to meet ARRADCOM's demand for a composition that would create a flash and signature smoke for mortar practice rounds. Pet. App. 1a-2a.

Under Armed Services Procurement Regulations (32 C.F.R. Pts. 1-101 (1982)),[1] contracts involving ammunition and explosives are governed by safety procedures set forth in the Department of Defense Contractors' Safety Manual for Ammunition, Explosives, and Related Dangerous Materials (Safety Manual). A prescribed safety clause to this effect is automatically included in such contracts. The head of procurement at ARRADCOM, however, has discretion either to omit this safety compliance clause entirely, thereby eliminating the application of the Safety Manual to the contract, or to include the clause but waive any mandatory requirements of the Safety Manual. See 32 C.F.R. 1.323.!(c) (1982). ARRADCOM has made a policy decision to make the requirements of the Safety Manual mandatory at all contractor owned and operated facilities except when orders are placed for

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[1] The regulations governing ARRADCOM's contract with ORI were known first as the Armed Services Procurement Regulations and later as the Defense Acquisition Regulations and were codified at 32 C.F.R. Pts. 1-39 (1982). These regulations have been superseded and replaced by the Federal Acquisition Regulations codified in Title 48 of the Code of Federal Regulations. Because the original regulations continue to apply to contracts entered into while they were in force, citations to the original regulations are used throughout.

"standard commercial items" in an amount less than $10,000. Pet. App. 3a.

The Chief of the Support Contracting Division, Procurement Directorate, of ARRADCOM elected not to include the safety clause in ARRADCOM's contract with ORI. Accordingly, ARRADCOM did not exercise its right to supervise safety at ORI's premises pursuant to the terms of the Safety Manual, nor did ARRADCOM insist that ORI adhere to the Safety Manual's specifications. Pet. App. 3a. ORI did, however, take precautions against an accidental explosion caused by static electricity. ORI required Ms. Eisenhut to wear a Wriststat to ground herself while she worked with 119G. Although the precise cause of the February 28, 1980, explosion is uncertain, Ms. Eisenhut was seen not wearing her Wriststat shortly prior to the accident. *Id.* at 24a.

2. After her administrative claim under the Federal Tort Claims Act was denied, petitioner filed this lawsuit alleging that ARRADCOM's failure to enforce or comply with procedures detailed in the Safety Manual helped cause the explosion. Petitioner also alleged that ARRADCOM failed to notify ORI of 119G's dangerous nature and that ARRADCOM breached its duty to inform ORI that government inspectors had observed safety violations during 119G's manufacture.

Following extensive discovery and oral argument, the district court on December 23, 1986, granted summary judgment for the United States (Pet. App. 1a-10a). The court noted (*id.* at 2a-6a) that ARRADCOM exercised policy-making discretion when it decided, pursuant to 32 C.F.R. 1-323.1 (1982), to omit the safety clause from its contract with ORI. Accordingly, the court found (Pet. App. 6a) that the discretionary function exception to the FTCA barred any claim against the United States for Ms.

Eisenhut's injuries based on ORI's alleged failure to comply with procedures in the Safety Manual.

The district court also concluded (Pet. App. 6a-8a) that ARRADCOM had breached no duty that it owed to Ms. Eisenhut under Florida law. The court noted (*id.* at 6a-7a) that Florida law imposes no duty upon employers to assure the safety of employees of independent contractors. The court further found inapplicable (*id.* at 8a) the exceptions to this general rule for employers who exercise supervisory control over the employees of independent contractors or who own the premises where an accident occurs.[2]

3. The court of appeals affirmed (Pet. App. 12a-32a). The court found (*id.* at 22a) that Florida law does not impose any duty on the purchaser of goods to notify the manufacturer of hazards involved in the production process. Moreover, the court concluded (*id.* at 22a-28a) that, even if ARRADCOM has such a duty, the record contained no evidence suggesting that ARRADCOM had superior knowledge of any dangers posed by small-volume manufacture of compound 119G. The court also found (*id.* at 29a- 32a) that Florida law imposed no obligation on parties hiring independent contractors to provide a safe workplace for the contractors' employees. Accordingly, the court concluded that petitioner had asserted no plausible theory that would render the United States liable had it been a private party acting under Florida law. The court, therefore, found (*id.* at 32a n.13) no reason to reach the issue resolved by the district court of whether the discre-

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[2] The district court also rejected (Pet. App. 9a-10a) plaintiff's claim that the government negligently communicated misinformation about the hazard level of compound 119G on the ground that it was barred by the misrepresentation exception of the FTCA, 28 U.S.C. 2680(h).

tionary function exception to the FTCA would bar petitioner's claim.[3]

ARGUMENT

The decision below is correct. It does not conflict with any decision of this Court or any other court of appeals. Accordingly, no further review is warranted.

1. Petitioner contends (Pet. 6-9) that the discretionary function exception to the FTCA, 28 U.S.C. 2680(a), does not bar her suit. As the court of appeals correctly noted (Pet. App. 32a n.13), however, summary judgment for the United States was properly granted regardless of whether Section 2680(a) barred petitioner's claim. The FTCA renders the United States liable for tort claims "in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. 2674. Accordingly, petitioner could prevail only if she could establish that ARRADCOM breached a duty that a private party would owe to an employee of an independent contractor under similar circumstances. As the courts below correctly found (Pet. App. 6a-8a, 21a-32a), Florida courts have repeatedly adhered to "the general rule that one who hires an independent contractor is not liable for injuries sustained by that contractor's employees in their work." *Skow* v. *Department of Transportation*, 468 So. 2d 422, 423 (Fla. Dist. Ct. App. 1985). Accord *City of Miami* v. *Perez*, 509 So. 2d 343, 345 (Fla. Dist. Ct. App.), review denied, 519 So. 2d 987 (Fla. 1987); *Crawford* v. *Florida Steel Corp.*,

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[3] Following this Court's intervening decision in *Berkovitz* v. *United States*, No. 87-498 (June 13, 1988), petitioner filed a petition for rehearing asking the court of appeals to reconsider its opinion on the discretionary function issue. The court of appeals denied the petition without opinion (Pet. App. 33a).

478 So. 2d 855 (Fla. Dist. Ct. App. 1985); *Van Ness* v. *Independent Construction Co.*, 392 So. 2d 1017 (Fla. Dist. Ct. App.), review denied, 402 So. 2d 614 (Fla. 1981).

Petitioner contends (Pet. 5) that ARRADCOM failed to conduct adequate safety inspections and failed to insist on adherence to the Safety Manual. The Florida Court of Appeals has clearly held, however, that an employer hiring an independent contractor is not responsible for failing to supervise conditions at the work site. *Van Ness*, 392 So. 2d at 1019-1020. Liability will not be imposed simply because the employer fails to monitor the contractor's compliance with safety regulations. *Skow*, 468 So. 2d at 424. Moreover, even when an accident occurs on the employer's premises, the employer will be liable only if it commits "identifiable acts of negligence" (*Perez*, 509 So. 2d at 346). Here, petitioner alleges (Pet. 5) that government employees witnessed the conditions at the ORI facility and failed to correct them. The Florida courts, however, have explicitly held (see, *e.g.*, *Perez*, 509 So. 2d at 347) that the mere presence of an on-site inspector is insufficient to create employer liability, and there is no evidence to suggest that government employees observed hazards that they had reason to suspect ORI itself did not perceive. In short, Florida law would afford no relief to petitioner suing a private party under similar circumstances. Accordingly, petitioner had no cause of action under the FTCA.

2. Petitioner misunderstands the import of the lower courts' ruling concerning Florida law and consequently offers no serious challenge to it. Instead, petitioner claims (Pet. 9-10) that the courts below resolved disputed issues of fact in a manner contrary to the standards governing summary judgment set forth in *Celotex Corp.* v. *Catrett*, 477 U.S. 317 (1986), and *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242 (1986). As *Anderson* makes clear (477 U.S. at 247-250), however, the district court's role when

deciding a summary judgment motion is to review the evidence presented and to determine whether a reasonable jury could properly infer that the nonmoving party had met its burden of persuasion. Here, following extensive discovery, the district court correctly concluded (Pet. App. 6a-8a) that no record evidence would support a jury verdict for petitioner because ARRADCOM breached no duties owed to petitioner under Florida law.

The court of appeals carefully reviewed the record (Pet. App. 22a-28a) under the assumption that Florida law might impose an additional duty on ARRADCOM to notify ORI if ARRADCOM knew of dangers posed by 119G and ARRADCOM knew or had reason to know that ORI was unaware of these dangers. Applying the proper summary judgment standard, the court of appeals concluded (*id.* at 24a) that "the inference cannot be made that ARRADCOM possessed such knowledge." Petitioner identifies no evidence nor suggests any inference to contest this conclusion. Indeed, ORI's own safety practices suggested that ORI was fully aware of the hazards involved in manufacturing 119G (see *id.* at 24a-28a). Accordingly, summary judgment was properly granted because the record contained no evidence suggesting that ARRADCOM had breached any duty owed to petitioner under Florida law.

3. Petitioner insists (Pet. 6) that the "central issue" in this case is whether the discretionary function exception bars a claim based on the government's failure to enforce mandatory safety regulations. Even assuming that the discretionary function exception does not bar petitioner's suit, however, petitioner must nonetheless state a cause of action against the United States under Florida law. Since both courts below have concluded that petitioner has failed to do so, and since petitioner does not seriously challenge that conclusion, there is, as the court of appeals

concluded, no occasion even to consider whether the discretionary function exception would bar such a suit.

In any event, even if ARRADCOM had been responsible for the safety of ORI employees under Florida law, the district court correctly concluded (Pet. App. 4a-6a) that petitioner's claims were foreclosed by the discretionary function exception. As this Court explained in *United States* v. *S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 819-820 (1984), "[w]hen an agency determines the extent to which it will supervise the safety procedures of private individuals, it is exercising discretionary regulatory authority of the most basic kind." The district court therefore correctly determined (Pet. App. 4a-5a) that ARRADCOM's decision not to incorporate the provisions of the Safety Manual in the contract with ORI was an exercise of discretion immune from suit under the FTCA.

Petitioner, relying on this Court's recent decision in *Berkovitz* v. *United States*, No. 87-498 (June 13, 1988), contends that *Varig Airlines* is inapposite because ARRADCOM had a mandatory duty to include a clause in the purchase contract incorporating the Safety Manual. The relevant regulation (32 C.F.R. 1-323.1(c) (1982)) here, however, explicity authorized a procuring agency to omit the safety clause. Pursuant to that regulation, ARRADCOM made a policy decision to permit contracting officers to omit the clause for all purchase contracts for standard commercial items in amounts less than $10,000 (Pet. App. 3a). ARRADCOM's contract with ORI covered smoke cartridges purchased for $8,935, and ARRADCOM's contracting officers exercised their discretion to omit the safety clause after determining that the cartridges were standard commercial items, a term not defined by statute or regulation. Since the contracting officers were required to balance the explicit regulatory goal of reducing

administrative costs on small purchases (32 C.F.R. 3-601 (1982)) with the safety gains expected from compliance with the manual, the choice concerning whether to include the safety clause involved a "policy judgment" that both *Berkovitz* (slip op. 4-5) and *Varig Airlines* (467 U.S. at 820) clearly shield from suit.[4]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

CHARLES FRIED
Solicitor General

JOHN R. BOLTON
Assistant Attorney General

JEREMY PAUL
Attorney

NOVEMBER 1988

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[4] Petitioner's reliance upon *McMichael* v. *United States*, 751 F.2d 303 (8th Cir. 1985), is similary misplaced. In *McMichael*, the Defense Department had included in its purchase contract with the manufacturer the clause incorporating the Safety Manual that ARRADCOM explicitly omitted here. Accordingly, the Eighth Circuit concluded (751 F.2d at 304 (emphasis added)) that the FTCA did not bar "the plaintiffs from recovery for failure to enforce compliance with the safety requirements *of the contract*." The Eighth Circuit thus found (*id.* at 307) that the government's failure to discover safety violations on the manufacturer's premises did not involve the exercise of discretion because the Defense Department had already exercised its discretion to undertake the safety requirements of the Safety Manual and had three on-site inspectors to enforce those requirements. ARRADCOM, by contrast, chose not to include the safety clause in its contract with ORI, and it assumed no responsibility for safety at ORI's premises.

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